UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

WILLIAM BEAUMONT HOSPITAL
Respondent

and **Case 07-CA-093885**

JERI ANTILLA, an Individual
Charging Party

BRIEF IN SUPPORT OF COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION[1]

On January 30, 2014, Administrative Law Judge Susan A. Flynn issued her decision in this matter. The ALJ erred in failing to find that a reasonable employee would construe all of the prohibitions contained in the Code of Conduct for Surgical Services and Perianesthesia ("Surgical Code") to discourage Section 7 activities in violation of Section 8(a)(1). In addition, notwithstanding her finding that Counsel for the General Counsel ("GC") met her burden under ***Wright Line***, the ALJ failed to make a specific finding that Respondent's discharges of RN Jeri Antilla and certified surgical technologist DeAnna Brandt were motivated by Antilla and Brandt's protected concerted activities. The ALJ also erred in finding, by relying upon employees' subjective reactions to Antilla and Brandt's protected concerted activities, that Respondent established that they would have been terminated absent their protected concerted activities.

The prohibitions in the Surgical Code violate Section 8(a)(1) under Board precedent. In addition, the record amply establishes by direct and indirect evidence that Respondent discharged Antilla and Brandt due to their protected concerted activities. Contrary to the ALJ's findings and conclusions, Respondent failed to establish that it would have discharged Antilla and Brandt in the absence of their protected concerted activity. Accordingly, Respondent's discharges of Antilla and Brandt for their protected concerted activities violate Section 8(a)(1).

II. STATEMENT OF FACTS

A. Antilla and Brandt's job duties; Antilla's 2011 appraisal[2]

[1] Throughout this brief, "Tr." refers to the transcript of the administrative hearing; "GCX," and "RX" refer to Counsel for the General Counsel's exhibits and Respondent's exhibits, respectively. Counsel for the General Counsel notes that the page numbers contained in the electronic form of Volume I of the transcript are inconsistent with the numbering contained in the paper copy of Volume I. The page numbers cited herein refer to the paper copy of the transcript. "ALJ" refers to ALJ Susan A. Flynn. "ALJD" refers to the ALJ's decision, dated January 30, 2014.

[2] All dates refer to 2012 unless otherwise stated.

Jeri Antilla began working at Respondent as a registered nurse on Respondent's labor and delivery unit, the Family Birth Center ("FBC"), in October 2006.[3] (Tr. 126) Antilla worked the midnight shift, and only worked Friday, Saturday, and Sunday nights. (Tr. 131) Associate Nurse Manager Tonyie Andrews-Johnson was her immediate supervisor. (Tr. 127) Antilla was recognized by management for her skills in training and mentoring. To that end, in late 2011, and again in early 2012, management selected Antilla as a "super user"—a person designated to help train the staff in technology upgrades. (Tr. 128-129) Her 2011 appraisal stated that "Jeri is capable of doing charge and precepting [4]and would like her to take the initiative for these responsibilities." (GCX 8)

Beginning in September 2012, Antilla filled in as a preceptor for new nurses Dusta Dukic, Tina Wadie, and Lauren _____when their assigned preceptors were unavailable. (Tr. 131) After precepting for Wadie on September 22-23,
Antilla and Wadie exchanged positive messages on Facebook. (Tr.146; GCX 10) On October 5, management selected Antilla to be charge nurse. (Tr. 147, 162) The following day, Antilla posted on Facebook a post thanking the staff who worked with her the night before, stating "You all made my night as charge nurse go very smoothly." Andrews-Johnson posted a response, stating "I knew you [sic] b[e] great, never had any doubts." Other employees posted positive responses. (GCX 11)

DeAnna Brandt began working for Respondent in November 2003, and worked as a certified surgical technologist on the FBC beginning in October 2010.[5] (Tr. 220) Brandt

[3] The employees on the FBC are not unionized (Tr. 132), contrary to the ALJ's finding otherwise. (ALJD p. 2, lines 11-12)
[4] A preceptor is an experienced nurse who is assigned a new nurse on orientation to mentor. The orientee shadows the preceptor until she becomes comfortable as a nurse and can work independently. (Tr. 130)
[5] When Brandt moved to the FBC, she continued to work in Respondent's Children's Surgery Center on a contingent basis until her discharge. (Tr. 223)

typically worked the midnight shift on Friday, Saturday, and Sunday nights. (Tr. 224) Her immediate supervisor was also Andrews-Johnson. (Tr. 224)

As a certified surgical technologist, Brandt worked with the surgeon in the operating room, assisting him or her during surgical procedures. Her job required her to maintain the sterile field[6] and prevent contamination of the sterile field, so that a patient did not acquire an infection. She and the surgeon prepared for and performed procedures within the sterile field. (Tr. 221) When the surgeon needed something from off of the sterile field, Brandt's job was to call for it, and the patient's nurse would provide it to her. (Tr. 351, 354-355) Brandt then would provide the instrument or equipment to the surgeon. (Tr. 354-355) Brandt was an experienced certified surgical technologist, and surgeons would expect her to anticipate and to have obtained from the nursing staff what he or she needed at the right time throughout a given procedure. (Tr. 355)

B. New nurses hired in 2011 and the "sentinel event" in December 2011

In 2011, 16 new nurses were hired for the FBC, primarily for midnight shift. (Tr. 511, 557) In December 2011, an unanticipated infant death occurred on the FBC, which Respondent refers to as a "sentinel event." (Tr. 70, 134-135, 619-620) Neither Antilla nor Brandt were working the night of the infant death. (Tr. 135, 236) After the sentinel event, litigation ensued, and nurses received notices of deposition. (Tr. 135, 655) In response to the sentinel event, Respondent held a "mandatory" safety conference for RNs[7] in January and February, during which fetal monitoring, bullying, staffing, chain of command, bedside reporting, documentation, safety, open communication, and team building were discussed. (Tr. 622; RX38)

C. Brandt's 2011 evaluation

[6] The sterile field included Brandt and the surgeon, a draped off portion of the patient, back tables, side table, and a mirror stand that covered patient. (Tr. 221)
[7] Brandt and RN Lori Post were not required to attend. (Tr. 116-117, 269)

On April 16, 2012, Brandt received her employee appraisal for 2011. Brandt wrote comments to her appraisal, stating that she had talked to Director of Women and Children and Psychiatric Services Anne Ronk, Andrews-Johnson, and the charge nurses about operating room concerns regarding patient safety, equipment, supplies, not getting tied up to set up a sterile field, and safety issues involving the new nurses. Brandt wrote that she did not feel her safety concerns were being addressed. (Tr. 239; GCX18) Brandt gave her comments to Andrews-Johnson. (Tr. 242) Brandt had raised these issues to Ronk and Andrews-Johnson in the past. (Tr. 241-242) She received no response from management. (Tr. 243)

D. Respondent hires new, inexperienced nurses

Beginning in about Spring 2012, in response to the sentinel event, Respondent hired about 12 to 16 more nurses for the FBC, primarily for the midnight shift. (Tr. 137, 633) Many were new graduates who had not passed their examinations to obtain their nursing licenses yet, and none of them had any labor and delivery experience. (Tr. 72, 138, 591, 632) Two of the new nurses, Dusta Dukic and Nadia Futalo, received their orientation on midnight shift. The others received orientation on days, and by Fall 2012, they were also working on the midnight shift. (Tr. 106, 138, 244) As the new nurses came onto the nights shift, more experienced nurses were able to exercise their seniority and transfer to the day shift. (Tr. 72-73, 86, 141-142).

E. The impact of the new nurses on the midnight staff and staff discussions

Although short-staffing had long been an issue for the FBC, the employees who testified discussed in detail how issues were more severe in the Fall of 2012 because the more experienced nurses were transferred to day shift, as the new, inexperienced nurses transferred onto the FBC. (Tr. 72-73, 132, 141-142, 244) With the influx of new, inexperienced nurses onto the FBC midnight shift, the more seasoned staff discussed amongst themselves, and with the new

nurses, the impact of the new nurses upon their jobs. Antilla, Brandt, Post, and Dukic, who all worked weekends, testified with regard to the impact on their jobs and their discussions about that impact. (Tr. 74-76, 139-141, 245-247)

Antilla testified that the influx of new nurses made for extra work, as many times the new nurses were overwhelmed, and had not mastered basic skills due to their lack of training, so the more senior staff members would need to help them with tasks they were not able to perform, such as starting IVs. (Tr. 138-139) She discussed these issues with other staff members, including RN Lori Post and Brandt. Antilla had discussions at the nursing station stating that the FBC had become such an unsafe environment that it not only put her nursing license "on the line," but also those of the new nurses, some of whom had not received their licenses yet, or put them at risk of being taken to court. (Tr. 139-141)

Antilla discussed with Post and Brant that a residency program should be started at Respondent for new nurses to provide them with additional training. (Tr. 139-141) Antilla also discussed with Brandt that she felt empowered to become an advocate for new nurses on the unit. (Tr. 140-141)

Indeed, in September, Antilla advocated on behalf of new nurse Dusta Dukic, for whom she was serving as a fill-in preceptor. At the time, Dukic had been demoted to a nurse tech because she had failed her nursing licensing examination. (Tr. 143) Dukic shared with Antilla that Andrews-Johnson left her in a room with a patient to do a delivery with no supervision or guidance. (Tr. 144) Dukic told her that she felt uncomfortable and scared being a left at the bedside alone. (Tr. 145) When Afternoon Associate Nurse Manager Alissa Amlin[8] sent an email asking for the nurse who performed the delivery to sign the delivery summary, Antilla

[8] Although admitted supervisor Amlin was still employed by Respondent at the time of hearing in her same position, she did not testify. (Tr. 493; GCX 1(e) and (g))

shared her concerns with Amlin, stating that Dusta said "she was left to care for this patient on her own. This saddens me that a tech is thrown into this type of situation with no resource, guidance, or help." (Tr. 142-143; GCX9)

Antilla also raised objections to Andrews-Johnson when a new nurse, three weeks out of orientation, was assigned to work triage. Antilla told Andrews-Johnson that, in the past, nurses needed six months to a year experience before working in triage. Antilla asked how a new nurse who had just finished orientation and could not yet work autonomously in labor and delivery could be in triage. Andrews-Johnson told Antilla that the nurse was very good and that she had received orientation during the day shift. (Tr. 152)

Post testified that the new nurses needed more guidance, and her job became "a little overwhelming at times," and "very, very busy and unsafe." (Tr. 73) The new nurses could not be given a more difficult patient, or two patients at the same time, so more would fall upon the experienced nurses. (Tr. 73-74) The experienced nurses would take two or three patients, while the inexperienced nurses would only get one, and the experienced nurses would need to help the new nurses with their assignments or watch their patient. Post testified that there were times when she and Antilla were the only experienced nurses other than the charge nurse, who did not typically take patients, and the other nurses were inexperienced. (Tr. 76) She testified that it became "scary" because if something went wrong when an inexperienced nurse was watching Post's patient, her license would be at risk. (Tr. 77)

Current employee Dusta Dukic testified that she worked with Antilla every weekend, and that Antilla filled in as her preceptor. (Tr. 375) Dukic testified that Antilla discussed with her issues of short-staffing on the FBC, including the large number of new nurses. (Tr. 373) Antilla also talked to her about research showing that orientation for new nurses on specialty units such

as labor and delivery should be six months. (Tr. 372) Antilla talked to Dukic about safety and training concerns she had regarding the new nurses, and Dukic agreed with Antilla that the orientation should be longer. (Tr. 376) Dukic also expressed her frustration to Antilla when she was demoted to a nurse tech after she failed to pass her nursing licensing exam, because she did not understand her role and was uncertain as to whether tasks she was asked to perform were within her scope of practice as a nurse tech. (Tr. 381-382, 384)

Brandt also testified about how the new nurses impacted her job. Brandt testified that the new nurses did not know what they were doing in the operating room. They also did not know what they needed to stock their rooms, so they would call Brandt. (Tr. 244-245) Brandt talked to charge nurses about these issues, letting them know that the new nurses needed extra guidance in the operating room. She would ask the preceptors to work with the new nurses on matters where their lack of experience impacted her job such as instrument counts and retrieving materials for her that she needed on the sterile field. (Tr. 245-246) She discussed with the other surgical techs how, with the inexperienced nurses, the order of procedures was not being performed correctly, sponge and instrument counts (necessary to avoid a sponge or instrument being left in a patient) were not performed correctly, and patients were not being safely secured on the operating table. (Tr. 247, 250) Brandt testified that seasoned nurses would also discuss with her how the new nurses were impacting her job. Brandt stated that these conversations occurred every night that she worked. (Tr. 247)

Brandt specifically recalled discussing the impact of the new nurses with Antilla. (Tr. 250) Brandt shared with Antilla that the new nurses did not know the name of instruments or how many instruments were in the 52 instrument set used in the operating room. (Tr. 250) She discussed with Antilla the importance of the new nurses doing counts at the right time (before the

uterus is closed), so that a sponge is not retained. (Tr. 250) Antilla told Brandt that she found her passion—making sure that the new nurses have adequate time in their training process because it will avoid mistakes and burnout. (Tr. 251)

F. Tina Wadie's resignation[9]

On October 18, new nurse Tina Wadie worked her last shift on the FBC. (GCX 26) Brandt testified unrebutted about Wadie's difficulties in the operating room during that last shift. Wadie did not return to work after that night. (Tr. 267)

On October 23, Wadie sent an email to Amlin, copying Andrews-Johnson and Decker. (RX 9) The email stated that she would no longer be working on the FBC unit. She stated that she did not believe she had "thick enough skin" to deal with all of the "strong personalities" involved with her position. She stated that she

> . . .feared going to work each night that my patient will have to go back for a section, because the OR is just brutal. It is very difficult to keep yourself on track when there are 4 or 5 different people shouting orders at you. [U]nfortunately I did not have many OR experiences on orientation. I think a little bit of understanding on their part would go along [sic] way.

The email continued:

> There are also many issues with the night staff. Many of the more experienced nurses like to sit and talk about how this unit is going to sink due to all of the new nurses being hired and put on nights. They like to comment on how they should "jump ship" before something horrible happens. After making these comments they look right at you and say "no offense," how do I not get offended by that? They are supposed to be the ones who we go to if we have questions, how do I go to someone who does not even want me on the unit? (RX9)

The email stated that the position was not working out for her and it was not fair for her to keep coming to work when she feels she is not "capable of doing the job." The email stated she was taking another position at an ob/gyn office that was "more her speed." (RX 9)

G. The discharge of Antilla and Brandt

[9] Wadie did not testify.

1. Respondent's investigation and decision to terminate Antilla and Brandt

After receiving Wadie's email, Respondent's recruiters "worked with" Wadie to place her in a different position in a different unit. (GCX 26) At the time of hearing, Wadie was working for Respondent in the medical/surgical unit. (Tr. 32)

Giannosa testified that she had "two or three" conversations with Wadie, at the request of her boss, Director of Human Resources Mike Dixon. (Tr. 445, 453) However, the only notes from her communication with Wadie are dated October 24. (GCX 27, RX 10) The notes state that Wadie had a hard time adjusting to the night shift. (GCX 27, RX 10) When she allegedly talked to Giannosa, Wadie "gave names"— specifically Antilla, Brandt, Post, and Wonch.[10] (Tr. 449) Giannosa did not find out from Wadie how many times she worked with Brandt.[11] (Tr. 503)

Giannosa's notes include statements that Antilla and others "sat around a lot [and] complained about the unit," and made comments about new the RNs and their licenses." Her notes also reflect that Wadie stated that other comments were made: "A lot of exp[erienced] RNs going to days. Not a lot of resources on nights," and "RNs are going to jump ship because new RNs are going to affect their licenses bad things are going to happen [sic]." (GCX 27; RX 10) On page three of her notes, Giannosa wrote "Not really bullying" and "a lot of people complaining." (GCX 27; RX 10)

On October 25, Giannosa sent an email to Chief Nursing Officer Maureen Bowman, Ronk, Andrews-Johnson, Dixon, Vice President of Child Health and Women's Health Alonzo Lewis, Employment Manager Jennifer Mattucci, and recruiters. (Tr. 452-453; GCX 26) In it, she

[10] Giannosa provided no details of her conversations with Wadie in her testimony, but rather relied upon her notes. (GCX 27, RX 10)
[11] Brandt testified unrebutted that she only worked with Wadie once. (Tr. 260-261)

stated that she conducted a phone exit interview with Wadie, and, during her month on the FBC, "Tina observed a lot of negative comments that were made in front of 'new RNs' that she found to be offensive and belittling." The email continued, "I asked Tina if she ever observed staff members using intimidation, bullying, or retaliation towards other staff members, she responded that it 'wasn't really bullying.'" The email stated that other new RNs had shared that they witnessed the same things, and that Wadie provided "a few specific situations, including three specific co-workers. I will work with [Ronk], [Amlin], and [Andrews-Johnson] regarding the performance concerns identified." (GCX 26)

On October 26 and 31, Giannosa met with Ronk, Andrews-Johnson, and Amlin. Administrative Nurse Manager Patricia "Missy" Knudsen participated by phone. Respondent introduced notes at trial which, although they are dated October 26, Giannosa claimed reflected discussion at both the October 26 and 31 meeting. (Tr. 455; RX 11) The notes explicitly spell out plans of action with regard to specific employees. The notes list Michele Wonch, Antilla, "Lori" [Post], and Brandt. "Jen" is listed and crossed out. Next to Wonch's name, it states "3 times Missy talked to her. Will put note in file." Underneath Wonch's name, it states "(PIP-not term)." With regard to Antilla, it states "term," and states that Ronk and Andrews-Johnson spoke to her, and references "expectations" and "negativity." Notably, the notes state near Antilla's name "complaining about unit/new RNs." Regarding Brandt, it states "term," and states "[Andrews-Johnson] notes in file about behavior," and "counseling PIP." The notes reflect that a note to file would be issued to Post. (RX 11)

Giannosa testified that she told Andrews-Johnson on October 26 to speak to the newer RNs on the night shift because Wadie identified them as sharing her concerns. (Tr. 462-463) Giannosa told her "to speak to them one-on-one to ask them how the unit was, did they have

concerns, and to not name any names." (Tr. 45, 463) Giannosa testified that Andrews-Johnson selected which employees with whom she talked, and Andrews-Johnson chose the nurses to whom she spoke to "random[ly]." (Tr. 463) Andrews-Johnson failed to testify with regard to how she chose the nurses to whom she spoke or the content of her interviews. Respondent only entered into evidence Andrews-Johnson's notes of her interviews, which the ALJ admitted over Counsel for the General Counsel objection on the basis of double hearsay, and then relied upon them for the truth of the matter asserted. (Tr. 463-465; RX 13; ALJD p. 12, lines 18-19)

None of the nurses with whom Andrews-Johnson allegedly spoke testified, and the record fails to establish that many of the nurses with whom she spoke were "new nurses," contrary to the ALJ's assumption. (ALJD p. 6, lines 20-35) Indeed, upon examination of the notes, it appears that some of the interviews were not with newer nurses. For example, Andrews-Johnson's note regarding Jamie Hoffmeister states "Jamie said...she could see how [Brandt's] behavior could negatively affect the newer staff members." (RX 13) Andrews-Johnson's note regarding Maggie Fullington states that Fullington said "she has been worried about how De[A]nna would treat the newer nurses on nights," implying that Fullington was not one of those newer nurses. (RX 13) Indeed, Andrews-Johnson testified that Fullington was not a new nurse. (Tr. 590, 605) One of the alleged incidents in Andrews-Johnson's notes of her conversation with Fullington regarding soiled linens, which was relied upon in Brandt's termination paperwork, occurred, according to Brandt's unrebutted testimony, a year before her termination. (Tr. 292-294; GCX 5; RX 13)

Andrews-Johnson failed to interview the new nurses who regularly worked with Antilla and Brandt, including Dusta Dukic and Lauren_____, whom Antilla precepted. (Tr. 368-369; RX 13) Andrew-Johnson did not testify as to why she failed to interview the new nurses with

whom Antilla regularly worked. Andrew-Johnson's notes are dated October 29 through November 7, continuing after the decision was made to terminate Brandt and Antilla. (RX13)

None of Respondent's witnesses identified a single manager as making the decision to terminate Antilla and Brandt.[12] Ronk testified that she "personally felt" by October 29 that Antilla and Brandt needed to be terminated. (Tr. 566; GCX 38) On October 29, Ronk sent an email to Knudsen, asking if she had notes from the sentinel event where staff "implicated [Antilla] and [Post] being disrespectful and making disparaging remarks at the nursing station."[13] Ronk stated,

> I thought you might have notes from that as well and we could use that as further evidence. I don't know that [Antilla] was ever talked with which is truly a bummer but water over the dam now. But I thought that would be more compelling evidence that she needs to go. We are likely to do this on Friday before she comes in or when she gets here. Staffing will be very tight for the weekend but the sooner we do this the better. [Brandt] is on as well and I would like to get them both termed on Friday[14] if possible. (GC X 38)

Notwithstanding Ronk's email and Giannosa's notes from the October 26 meeting, Respondent's witnesses claimed that it did not make a "preliminary" decision to terminate Antilla and Brandt until October 31. (Tr. 34, 43, 541, 583)

On October 31, Ronk sent an email to Andrews-Johnson, Giannosa, and Knudsen, asking "[s]ince there seems to be a theme with Lori and Michelle as well, should we do anything formal with them? PIP or just a counseling with a signature? . . .I would assume we can pursue termination of [Antilla] and [Brandt] but please advise Amy [sic] . . ." Giannosa responded that, in the meeting, they discussed: terminating Antilla and Brandt; counseling or Level I PIP to

[12] The ALJ made indecipherable findings as to who made the decision to discharge Antilla and Brandt. First, she found the final decisions [to terminate Antilla and Brandt] were made at a meeting on November 8, by Ronk Knudsen, and Giannosa, with any [sic] input from Andrews-Johnson and Amlin." (ALJD p. 8, lines 3-5) However, the record is devoid of evidence that any such meeting occurred on November 8. Then she later appears to make a finding that Andrews-Johnson made the decision to terminate Antilla and Brandt. (ALJD p. 12, lines 46-47)
[13] Antilla, Brandt, and Post did not work the night of the sentinel event. (Tr. 70, 135, 236)
[14] October 29 was a Monday.

Wonch, and if she doesn't have any documentation in her file, she recommended counseling; talking to Post and writing a "note to file" or a counseling PIP. (RX 12)

Giannosa responded, "Obviously you have substantiated the concerns [Wadie] brought forward. That said, I support our original plan!" (RX 12) Nonetheless, Andrews-Johnson appears to have continued to build a case against Antilla and Brandt as some of her interview notes post-date the October 31 meeting. (RX 13)

Giannosa testified that Antilla and Brandt were terminated for intimidating, harassing, and bullying behavior, which Respondent failed to define. (Tr. 39, 44) In deciding to terminate Antilla and Brandt, Respondent relied upon Wadie's email (RX 9), Andrews-Johnson's notes of her interviews (RX 13), and, according to Giannosa, Antilla and Brandt's background. (Tr. 36, 46)

According to Giannosa, Wonch and Post were also "found to be bullies," but the concerns raised regarding Wonch and Post were not "as severe" and they believed Antilla was the "**ringleader**."[15] (Tr. 476, 492-493)

In Giannosa's notes dated October 26, the plan of action set forth included writing Performance Improvement Plans (PIPs)[16]. (RX 11) None of Respondent's witnesses admitted to drafting Antilla and Brandt's PIPs (GCX 4 and 5), and, while their PIPs are dated November 6, the record is unclear as to when Respondent began drafting them.[17]

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[15] The ALJ erroneously found, absent record evidence, that the reason Antilla was characterized as a "**ringleader"** had nothing to do with her complaints about working conditions. (ALJD p. 13, lines 31-32) In doing so, the ALJ erred by inventing what she believed Respondent meant by characterizing Antilla as a "**ringleader of negativity**," when Respondent's witnesses failed to define the term in that manner.

[16] The discipline progression set forth on the Plan for Performance Improvement forms is: Review Level: Counseling; Level I-Performance Plan; Level II-Performance Plan; Level III-Termination. (Tr. 29; GCX4, GCX5, GCX17)

[17] Ronk testified that Giannosa prepared Antilla and Brandt's PIPs. (Tr. 61, 63) However, Giannosa testified that she reviewed the PIPs, but could not recall which manager(s) prepared them, or when she received them. (Tr. 39-41, 46-48) Giannosa stated that she only added portions of the "Plan for Performance Improvement and future expectations" to the second page of both documents. (Tr.41-42, 48; GCX 4 and GCX 5) Neither Andrews-Johnson

2. November 2 meeting with Brandt and Ronk's oral promulgation of an overly broad rule not to talk to employees

On November 2, after the "preliminary" decision was made to terminate her, Amlin told Brandt to see Ronk in her office. (Tr. 251) When Brandt arrived, Ronk told her that a nurse quit, and that the nurse said that she quit because Brandt was "mean and nasty and rude." Brandt said, "I have no idea what you're talking about." Ronk shared with Brandt that the nurse was Tina Wadie, and said that others had complained about her. (Tr. 251-253, 258-259; ALJD p. 7, lines 1-15) Ronk stated that management would be speaking with multiple staff members before making a decision about what action to take. (GCX 34; 251-253) In addition, she referred Brandt to classes through Beaumont University. (GCX 34)

It is undisputed, corroborated by Ronk's notes of the meeting, that during this meeting Brandt shared multiple issues that she perceives are occurring on the unit. The notes reflect that Brandt shared that "she feels the new RNs are not receiving enough training in the OR." (GCX 34) The notes confirm Ronk's promulgation to Brandt that she not discuss the investigation with other employees: "I told [Brandt] that I did not want her to discuss our conversation with anyone else on the unit. She agreed that she would not talk about our meeting with others on the unit." (GCX 34)

Other than a counseling she received for a Facebook posting about coworkers making comments about her daughter, Brandt was never talked to by management about any alleged communication issues, intimidation, or bullying prior to the November 2 meeting. (Tr. 298; GCX17)

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nor Knudsen testified with regard to preparation of the PIPs. Amlin did not testify at all at the hearing. Nonetheless, the ALJ erroneously substituted her own assumption for record evidence and made a factual finding that Andrews-Johnson drafted the PIPs (ALJD p. 8, lines 19-21)

3. Brandt's Emails to Ronk

On November 2, after meeting with Ronk, Brandt enrolled in classes at Beaumont University, as instructed. Brandt emailed Ronk on November 3 to inform her of the classes in which she enrolled, and of her efforts that weekend to be friendly and welcoming to the new nurses. (GCX 19)

4. November 5 meeting with Antilla

On November 5, after her shift, Antilla was called to the office to meet with Amlin and Andrews-Johnson. Amlin told her that her name had been brought up by a few nurses. Amlin told her that she [Antilla] had made comments regarding her nursing license being on the line, that other comments were made regarding the new staff and how Antilla felt that they should not be working in a labor and delivery unit. Amlin said that comments were made that it was unsafe in the unit. (Tr. 153-155; RX 25)

Andrews-Johnson asked Antilla to explain her side of the story and what she thought of the comments that had been made. Antilla agreed that she had made all three comments, and that when she made the comment about her nursing license being on the line, it wasn't just her license, it was everyone who works in labor and delivery in regard to the safety issues that were occurring on the unit. Antilla explained that, up until recently, employees needed one to two years nursing experience prior to working in labor and delivery because it is specialty unit. She stated that she did not feel that a new graduate nurse without any nursing experience should work in labor and delivery without extensive orientation. She also explained that there were several hospitals throughout the country that offered a residency program for new nurses. (Tr. 153-155)

She was told that it had been said that she was negative and that can be construed as intimidating or bullying, and that her name had been brought up in the past in early 2012, and

she was negative then, but then she got better, and now she's negative again. (Tr. 153-155) Amlin told her that she should compose a letter about the comments that she made and that human resources would be calling after a thorough investigation. Antilla asked what this meant—was she going to lose her job? Amlin stated that she didn't know, that it might be a one-day suspension. (Tr. 156)

When Antilla got up to leave, Andrews-Johnson told her that she might want to take out her tongue ring because it was frowned upon there. (Tr. 156) Antilla had her tongue ring since before she began working for Respondent, and no one had ever talked to her about it prior to November 5. (Tr. 156-157)

In addition, prior to November 5, no one from management had talked to Antilla about being intimidating, inappropriate, or engaging in bullying behavior. (Tr. 156, 169)

5. November 5 management meeting

After the meetings with Antilla and Brandt, Andrews-Johnson, Giannosa, Amlin, and Ronk met to discuss their respective meetings.[18] (Tr. 549, 585-586) The record is devoid of evidence that any management meeting occurred on November 8, as incorrectly found by the ALJ. (ALJD p. 8, lines 3-5) Andrews-Johnson testified that she shared her notes of the meeting with Antilla with the other participants. (Tr. 585-586; GC X25) Respondent's witnesses provided no further detail about what was discussed at this meeting, other than nothing occurred in the meetings with Antilla and Brandt to change their minds about terminating them. (Tr. 550)

[18] Giannosa did not recall any meetings after October 31. (Tr. 50)

6. Discharge of Brandt

Prior to Brandt's November 8 shift, Ronk called her and asked her to come in before her shift to go over the findings of her investigation. Brandt met with Ronk and Andrews-Johnson.[19] (Tr. 285) Ronk said that after completing their investigation, after interviewing all the nurses on the unit, they were going to terminate her employment. (Tr. 285-286). Ronk gave her a termination PIP, and asked if she would like to read it. Brandt did. (Tr. 286; GCX 5)

The PIP stated it was prepared November 6, and that her violation was "Improper Conduct." (GCX 5) It states "FBC management has received multiple concerns from staff regarding [Brandt's] behavior," and co-workers state that she continually exhibits "mean, nasty, intimidating, and bullying behavior." The PIP then goes on to list "specific behaviors observed by co-workers." These include, *inter alia,* yelling at an RN during a C-section in the operating room regarding supplies, telling coworkers that a nurse didn't know what she was doing and that she hated being in the OR with her. The PIP states that "multiple RNs reported to management that their overall interaction with [Brandt] is unpleasant, negative, belittling, and intimidating." (GCX 5)

The PIP states that on November 2, Ronk met with Brandt, and reminded her that she spoke to her earlier about negative comments on Facebook concerning her co-workers. It states that, during the November 2 meeting, Brandt shared that she feels the newer RNs were not receiving enough training in the operating room. (GCX 5)

In the "Background" section of the PIP, it cites her Facebook counseling PIP from June 2011, and an August 2006 conversation that allegedly occurred during her orientation in which she was counseled about being curt when asking for supplies for the sterile field. The PIP states

[19] Contrary to the ALJ's finding (ALJD p. 9, line 5), the record is devoid of evidence that Amlin was present at Brandt's termination meeting.

that Respondent has "zero tolerance" for conduct that is "inappropriate or detrimental to patient care or hospital operations or that impedes harmonious interactions and relationships." (GCX 5)

Contrary to the ALJ's findings (ALJD p. 13, lines 18-20), neither Ronk nor Andrews-Johnson explained any of the incidents listed or asked for Brandt's version of events. (Tr. 290-291) After Brandt finished reading the PIP, she referred to the Facebook incident listed on the PIP and said that was a year and a half ago. (Tr. 287) Brandt asked why it was in her termination paperwork. Ronk said it was negative behavior. (Tr. 298)

Brandt referred to the August 2006 incident which allegedly occurred during her orientation. Brandt said she had no idea—she was never given a communication report.[20] Brandt asked where it was, and Ronk said HR had it in her file.[21] Brandt asked to see it. Ronk said it didn't matter—she was terminated. (Tr. 287-290) Brandt also asked to see the email that Wadie sent her. Ronk stated that it was part of HR's information now, and it didn't matter because she was terminated. (Tr. 290) Ronk asked her to sign the PIP, and Brandt refused. (Tr. 287-290)

7. Discharge of Antilla

On November 9, Antilla received a phone call from Ronk stating that she wanted to see her before her shift. Antilla met with Ronk, Amlin, and Andrews-Johnson in a conference room.[22] Ronk pulled out paperwork and said that, in light of her behavior and the investigation, she was being terminated for being the "**ringleader of negativity**" on the unit. (Tr. 157) She stated that her name had been brought up, and it had also been put in a letter from an employee who had recently quit. Because Wadie was the only one who had recently quit on the FBC,

[20] Brandt's unrebutted testimony was that if a manager speaks to an employee about communication, there should be a communication report written that both the manager and employee signs. (Tr. 287-290)
[21] Respondent failed to enter into evidence any documentation of the alleged August 2006 communication.
[22] The record evidence establishes that all three supervisors were at the meeting. The ALJ failed to place Amlin at the meeting, which is significant, since Amlin failed to testify. (ALJD p. 9, line 33-34)

Antilla said, "why would Tina implicate me in anything?" Ronk said that she wasn't going to tell her it was Wadie. (Tr. 157-159).

Ronk said that her name had come up from a few nurses in regard to being intimidating and bullying. (Tr. 159) Ronk pointed to the PIP where it listed comments that Antilla allegedly made. (Tr. 159; GCX 4) The first incident she pointed out involved a stepstool. The PIP stated that Antilla was covering for the charge nurse, and an RN was unable to leave her room to retrieve a stepstool because her patient was about to deliver, so she asked Antilla to retrieve one. The PIP stated that Antilla told the RN that she should have the proper supplies in her room and that she needed to be better prepared, and later made comments at the nursing station about how unprepared the RN was for the delivery. (Tr. 159; GCX 4)

Antilla explained to Ronk what happened—that the doctor suspected that there was risk for a shoulder dystocia, a dangerous situation where the baby's head comes out, but the rest of the baby's body does not, and the baby's oxygen supply can be cut off. In that situation, there are different maneuvers that the nurse needs to do, but she needs a stepstool in order to be higher than the bed. Antilla turned to grab the stool, and there was no stool in her room. Antilla had to run to one of the empty rooms to grab a stool. After the delivery, Antilla pulled the nurse, Alyssa Jagistch, aside and told her that when she opens her room, there are several things that she needs, but the most important are a stepstool, and a bag and mask for emergency situations. After telling this to Jagistch, Antilla went over to the nursing station, and went over with the nurses what equipment they needed in the rooms. (Tr. 160-161)

Ronk then pointed out the allegation that Antilla said "there is the right way to do things, and then there's the night way to do things." Antilla denied stating this. Andrews-Johnson responded that Antilla had said that. (Tr. 161)

Antilla then questioned the statement that she hates working weekends because there were too many new RNs. Antilla said that she chooses to work weekends, and if it was an issue, she would have switched her schedule to work during the weeks. (Tr. 161) Ronk did not respond. (Tr. 162)

Antilla asked why, if this had been going on for awhile, and this is how she was perceived on the unit, then why was she chosen to be charge nurse on October 5? No one responded. (Tr. 162)

Antilla then discussed a phone conversation with Ronk from September 2011, cited in the "Background" section of the PIP, which stated that Ronk addressed concerns related to Antilla "being negative on the unit and lack of engagement in her role." (Tr. 162-163; GCX 4) Antilla said that she was never addressed during the phone call as being negative or lacking engagement in her role. (Tr. 163) Ronk said that Antilla needed to talk calmly like her. (Tr. 163)

Ronk stated that Respondent had a "zero tolerance policy" for being a bully or being intimidating, and that's why she was being terminated. (Tr. 163) She also said that it would be reported to the State Board of Nursing and a violation would be put against her nursing license. (Tr. 163)

Antilla brought up the notation under "Background" that stated in May 2012 Andrews-Johnson shared feedback from co-workers with Antilla that she was intimidating. (Tr. 163; GCX 4) Ronk told her that this comment was in reference to her expressing an interest in precepting, and Andrews-Johnson told Antilla that, because of her intimidating behavior, she would not be a good candidate for that. (Tr. 163; GCX 4) Antilla denied this, stating that her evaluation from Andrews-Johnson, which was submitted into her file in May, stated that she needed to take the initiative to be a preceptor and do charge. Antilla pointed out that it did not make sense for

Andrews-Johnson to submit an evaluation stating that she should be precepting during the same time period when Andrews-Johnson was supposedly telling her that she was too intimidating to serve as preceptor. [23] (Tr. 164)

Ronk told Antilla that Wadie did not show up for work, and HR called her several times and requested that she write a letter. Ronk stated that the letter she wrote contained Antilla's name and several others as being intimidating and bullying. (Tr. 165) Antilla raised the positive Facebook messages between Wadie and her after Antilla precepted her. (Tr. 165; GCX 10) Antilla stated that she only worked with Wadie one other weekend—the weekend she served as charge nurse—other than the weekend that she precepted her. (Tr. 166)

Antilla provided a letter she wrote, along with attachments, explaining that it was the letter that Amlin encouraged her to compose at the November 5 meeting. (Tr. 166; GCX 12)

Like Brandt's PIP, Antilla's PIP states as her violation "Improper Conduct," and that it was prepared November 6. Similar to Brandt's PIP, it states that FBC management received "multiple concerns" from staff regarding Antilla's behavior, and that co-workers state that Antilla continually exhibits "negative, intimidating, and bullying behavior," and describe Antilla as the "'ring leader' of negativity on the unit." The PIP states that "[i]t was reported by multiple co-workers that Antilla engages the senior RN staff on the unit in negative conversations about other staff members, specifically the newer RNs." The PIP then goes on to list "specific behaviors observed by co-workers." These include, *inter alia,* co-workers reporting that Antilla "talks and acts negatively towards the new RNs," and "[i]t was reported that Antilla has said she

[23] Neither Andrews-Johnson nor Ronk addressed Andrews-Johnson's alleged conversation with Antilla regarding precepting in their testimony. Adverse inferences may be drawn based on the failure of a party to question its own witness about matters which would normally be thought reasonable where such an omission does not appear unintentional, and such adverse inferences are appropriate here with regard to Andrews-Johnson and Ronk's testimony. ***Colorflo Decorator Products, Inc.***, 228 NLRB 408, 410 (1977).

"hates working on the weekends because there are too many new RNs and they are unsafe," "something bad is going to happen with all these new RNs." (GCX 4)

The PIP states that, during the November 5 meeting, Antilla stated that she feels graduate nurses should not be allowed to work on FBC and if they are they should have a longer orientation than 12 weeks." The PIP also states that despite addressing piercings with Antilla,[24] she continues to wear a tongue ring. The PIP states that Respondent has "zero tolerance" for conduct that is "inappropriate or detrimental to patient care or hospital operations or that impedes harmonious interactions and relationships." (GCX 4)

Prior to Antilla's discharge, the only discipline or counselings she received in the past were for attendance. (Tr. 168-169)

8. Respondent denies Antilla's grievance

Antilla filed a grievance over her termination. (Tr. 168; GCX 14) Antilla's grievance over her termination was denied in December 2012. (Tr. 174; RX 15) Both Ronk and the form setting forth the denial stated, *inter alia*, that Antilla failed to take ownership for her behavior and was not able to share any significant changes that she would make in her communication skills because of this, Antilla would not be reinstated to the hospital.[25] (Tr. 174; RX 15)

9. Counseling of Post

On November 26, Post was called into Andrews-Johnson's office. Andrews-Johnson said that she needed to let her know that her name was involved in the incident regarding Antilla. Andrews-Johnson said that she just needed to let her know that her name was

[24] Antilla's unrebutted testimony was that the first time her piercing was raised was during the November 5 meeting. (Tr. 156-157)
[25] Notably, Brandt did sign up for communication classes after her meeting with Ronk on November 2, 2012, yet Respondent still terminated her. (GCX 19)

involved, and "you weren't the **ringleader**." A note of the counseling was placed in Post's file. (GCX 25(j))

H. Unlawful Rules

The ALJ found (ALJD p. 2, lines 38-39) that the "Code of Conduct for Surgical Services and Perianesthesia" ("Surgical Code") (RX 6) has been distributed to employees since at least October 6, 2009. The document states, in pertinent part:

> "Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action. Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:
>
> - Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
> - Profane and abusive language directed at employees, physicians, patients or visitors.
> - Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
> - Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
> - ...Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.
> - ....Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork."

III. ARGUMENT

A. The ALJ erred by failing to find portions of Respondent's Code of Conduct for Surgical Servicers and Perianesthesia to employees, which includes rules which employees would reasonably construe as discouraging Section 7 activities, violated Section 8(a)(1) of the Act.

1. Applicable Legal Principles

The maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1). ***Lafayette Park Hotel***, 326 NLRB 824, 825 (1998), enfd. mem., 203 F.3d 52 (D.C. Cir. 1999). In determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading. ***Palms Hotel and Casino***, 344 NLRB 1363, 1367 (2005); ***Lutheran Heritage Village-Livonia***, 343 NLRB 646, 646 (2004). The Board first should decide whether the rule explicitly restricts activities protected by Section 7. ***Id.*** at 646. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. ***Palms Hotel and Casino***, supra at 1367; ***Lutheran Heritage Village-Livonia***, supra at 646.

In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather should be construed in context. ***Lutheran Heritage Village-Livonia,*** supra at 646. Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. ***Costco Wholesale Corp.***, 358 NLRB No. 106 at 3 (2012) (rule that did not present any accompanying language restricting its application would be reasonably read to apply to protected concerted activities). See also ***University Medical Center***, 335 NLRB 1318, 1320-22 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in rel. part*, 335 F.3d 1079 (D.C. Cir. 2003). Any ambiguity in the rule must be construed against the employer who promulgated it.

Karl Knauz Motors, Inc., 358 NLRB No. 164 at 2 (2012); ***Palms Hotel and Casino***, supra at 1368.

2. The ALJ Ignored Controlling Legal Precedent in Finding Portions of the Surgical Code Lawful

The ALJ summarily found that portions of the Surgical Code were lawful, ignoring controlling Board precedent.

To begin, the ALJ erred by finding the introductory paragraph lawful. (ALJD p. 17, lines 27-33) The Board has held rules subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees" are unlawful where the rule does not lawfully define what it means to "work harmoniously" or to fail to do so. ***2 Sisters Food Group***, 357 NLRB No. 168, slip op. at 3 (2011). The phrase "impedes harmonious interactions and relationships" is vague and could easily be interpreted to include questioning supervision, discussing working conditions, or union organizing. The ALJ's attempted rationale—that the rules are "put in context via reference to legitimate business concerns (i.e. patient care, hospital operations, and a safe healing environment)" –is insufficiently supported by the actual text of the rules, which on their face fail to define what is meant by harmonious interactions and relationships. In other words, the ALJ is misconstruing what type of restricting language a reasonable person would find to limit the rule's ambiguity and clarify that it does not apply to protected concerted activities.

In addition, "improper conduct or inappropriate behavior or defiance" is defined, but it is defined by providing unlawful examples, as set forth below. Accordingly, the introductory paragraph is unlawful.

The ALJ also erred by failing to find unlawful the prohibition against "willful and

intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors." (ALJD p. 18, lines 5-18) In her error, the ALJ summarily found the rule to be "clear and legitimate," without analysis, ignoring Board precedent of ***Flamingo Hilton-Laughlin***, in which the Board found a rule unlawful which prohibited "disorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees." 330 NLRB 287, 287, 295 (1999). This prohibition is similarly unlawful and would be read by a reasonable employee to prohibit Section 7 activities.

Likewise, the ALJ erred by failing to find the prohibition against "profane and abusive language directed at employees, physicians, patients, or visitors" unlawful. (ALJD p. 18, lines 5-18) Again, in doing so, the ALJ ignored and failed to distinguish ***Flamingo Hilton-Laughlin***, supra, at 288, 295, which found a similar rule prohibiting "loud, abusive, or foul language" unlawful. Accordingly, the prohibition at issue here is unlawful.

The ALJ similarly erred by failing to find unlawful the prohibition against "[b]ehavior that is rude, condescending, and otherwise socially unacceptable. Intentional misrepresentation of information." The first portion of this prohibition is unlawfully overly broad, in that the terms are undefined. See, e.g. ***Costco Wholesale Corp.***, 358 NLRB No. 106, slip. 1-2 (2012)(rule prohibiting comments that "damage the Company, defame any individual or damage any person's reputation" found unlawfully overbroad); ***Knauz BMW***, 358 NLRB No. 164, slip op. at 1 (2012)(rule stating that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Company]" found overly broad). The second portion violates the maxim long held by the Board and the Courts that the maintenance of rules prohibiting employees from making false statements violate Section

8(a)(1). ***Lafayette Park Hotel***, supra at 828; ***American Cast Iron Pipe Co.***, 234 NLRB 1126, 1131 (1978), enfd. 600 F.2d 132 (8th Cir. 1979).

Finally, the ALJ erred by failing to find unlawful the prohibition against "[n]egative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors." ***Costco Wholesale Corp.***, supra at 1-2 (rule prohibiting comments that "damage the Company, defame any individual or damage any person's reputation" found unlawfully overbroad); ***Knauz BMW***, supra at 1(rule stating that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Company]" found overly broad).

Accordingly the Surgical Code, with prohibitions an employee would reasonably read to discourage protected concerted activities, violates Section 8(a)(1). The ALJ erred by failing to find the introductory paragraph and all of the prohibitions of the Surgical Code unlawful.

B. The ALJ Erred by Failing to Find that Respondent Discharged Antilla and Brandt Due to Their Protected Concerted Activities in Violation of Section 8(a)(1) of the Act.

The ALJ erred by failing to find that Respondent discharged Antilla and Brandt due to their protected concerted activities in violation of Section 8(a)(1) of the Act.

While the ALJ correctly found that the GC met her initial burden under ***Wright Line,*** she erred in her analysis of what constituted protected concerted activities and failed to make a specific finding that Respondent's discharge of Antilla and Brandt was motivated by their protected concerted activities. The record amply establishes direct evidence that Respondent's discharge of Antilla and Brandt was motivated by their protected concerted activities. In addition, contrary to the ALJ's conclusions, the record evidence establishes that the failure to

adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support an inference that Respondent's motive in discharging Antilla and Brandt was unlawful.

1. Applicable Legal Principles

In ***Meyers Industries (Meyers I)***, the Board held that the discharge of an employee violates Section 8(a)(1) if: (1) the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the Act; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discharge was motivated by the employee's protected concerted activity. 268 NLRB 493, 497 (1984). See also ***Hispanics United of Buffalo, Inc.***, 359 NLRB No. 37, at 2 (2012).

Whether an adverse employment action such as a discharge violates the Act depends on the employer's motive. To show a violation of Section 8(a)(1) turning on employer motivation, the government must prove, by a preponderance of the evidence, that an individual's protected concerted activity was a motivating factor in the employer's action. The quantum of animus needed to be shown is only that which is enough to establish that protected concerted activity is a substantial or motivating factor, ***Manno Electric***, ***Inc.,*** 321 NLRB 278, 280 n. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997). Once the government makes this showing, the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected concerted conduct.

To sustain its burden, the government must show that the employee was engaged in protected concerted activity, that the employer was aware of that activity, that the activity was a substantial or motivating reason for the employer's action, and there was a causal connection

between the employer's animus and its challenged conduct or action. ***NLRB v. Transportation Management Corp.***, 462 U.S. 393, 397, 401-03 (1983) (approving ***Wright Line,*** 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)).

The employer's motive may be inferred from the total circumstances provided and from the record as a whole. ***Coastal Insulation Corporation***, 354 NLRB 495, 514 (2009); ***Fluor Daniel, Inc.***, 304 NLRB 970 (1991). Evidence of suspicious timing, failure to adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support inferences of discriminatory motivation. ***Coastal Insulation Corporation***, supra; ***Medic One, Inc.***, 331 NLRB 464, 475 (2000); ***Relco Locomotives***, supra at 19.

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." ***W.F. Bolin Co.***, 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996) (unpublished).

2. The ALJ erroneously failed to find some of Antilla and Brandt's protected concerted activity constituted protected concerted activity

Although the ALJ found that Antilla and Brandt were engaged in protected concerted activity once they brought their complaints to management, she erred in her analysis of whether their discussions with their coworkers alone constituted protected concerted activities. (ALJD p. 10, 40-44) The ALJ erroneously concluded "[i]t is arguable whether [Antilla and Brandt's discussions regarding working conditions] in themselves initially constituted protected concerted activity, as there was no evidence presented that any employee planned to take any action based upon those complaints and there was no concerted purpose, it was mere complaining." (ALJD p.

10, 40-44) In so concluding, the ALJ failed to consider ***Meyers II***, 281 NLRB 882, 887 (1986), which states that concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." As the Board has recently noted, "the object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate." ***Hispanics United of Buffalo, Inc.***, 359 NLRB No. 37, at 3 (2012), citing ***Relco Locomotives, Inc.***, 358 NLRB No. 37, slip op. at 17 (2012), and ***Whittaker Corp.***, 289 NLRB 933, 933 (1988).

Even absent an express announcement about the object of an employee's activity, "a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions..." ***Id.*** Here, Antilla and Brandt's "mutual aid" object of preparing their coworkers for group action was implicitly manifest from the surrounding circumstances. ***Hispanics United***, supra at 3, citing ***Timekeeping Systems, Inc.***, 323 NLRB 244, 248 (1997).

Thus, Antilla, Brandt, Post, and Dukic all testified regarding the discussions among the staff of issues of common concern on the midnight shift caused by the influx of new, inexperienced nurses during Fall 2012, exacerbating the already-existing staffing shortage, increasing the seasoned staff's workload, and causing the nurses to feel their nursing licenses were at risk. (Tr. Tr. 74-76, 139-141, 245-247) The employee witnesses testified that Antilla and Brandt discussed their desire to seek increased training and orientation for the new nurses. (Tr. 77, 139-141, 372-373, 376) And, indeed, ultimately both Antilla and Brandt raised these issues with management. (Tr. 152, 325-326, 589; GCX 18) In addition, when Antilla was

precepting for Dukic, she communicated to management Dukic's concerns about her role as a nurse tech.[26] (GCX 9; Tr.142-145)

Even though Antilla and Brandt had not formulated any plan together to take action regarding the staff's concerns, their activity was concerted. The Board found in ***Relco Locomotives***, supra, that the discharge of two employees for discussing among themselves and other employees their "concern" about the rumored discharge of a fellow employee was unlawful, notwithstanding that the two never talked specifically about working together to address their concerns about the employee's termination. Moreover, the Board found that it did not matter that they had not yet taken their concerns to management—"their discussions with coworkers were indispensable initial steps along the way to possible group action." ***Id.*** at 17. See also ***Hispanics United***, supra at 3.

In addition, the ALJ erred in dismissively characterizing Antilla and Brandt's concerns about nurses losing their licenses as "misplaced fear." (ALJD 13, lines 10-12) Their discussions regarding new nurses' lack of experience and how that inexperience endangered the nursing licenses of the staff and put them at risk for legal action relate to their working conditions, and thus constitute protected concerted activities. ***Parr Lance Ambulance Service,*** 262 NLRB 1284, 1286-1287 (1982) (EMT's concerns that missing equipment as it related to patient care put his license at risk and put him at risk for a lawsuit protected); ***Misericordia Hosp. Medical Center v. NLRB***, 623 F.2d 808, 812-815 (2d Cir 1980) (nurse's participation in preparing a report, which described problems with staffing and cleanliness at the hospital, was protected concerted

[26] The ALJ erroneously found that Antilla communication to management about Dukic's (whom the ALJ misidentifies as "Kukic" p. 4, line 32) concerns about her role as a nurse tech did not constitute protected concerted activities. ***Meyers I,*** 268 NLRB, 493 497 (1984) (activities are concerted when engaged in on behalf of other employees). The ALJ's finding that Antilla's conversation with Andrews-Johnson about placing a nurse in triage with insufficient training when an experienced nurse was needed did not constitute protected concerted activity was similarly contrary to law. (ALJD p. 4, lines 34-36)

activity); See also ***Summit Healthcare Association,*** 357 NLRB No. 134 slip op. at 4, n.12 (2011).

3. The ALJ erred by failing to make a specific finding that Antilla and Brandt's protected concerted activities were a motivating factor in Respondent's decision to discharge them

As stated above, while the ALJ correctly found that the GC met her initial burden under ***Wright Line***, she failed to make a specific finding that Respondent's discharge of Antilla and Brandt was motivated by their protected concerted activities. The record amply establishes direct and indirect evidence of Respondent's unlawful motivation.

a. Direct evidence of unlawful motivation

Direct evidence and admissions demonstrate the Respondent's unlawful motive. Where, as here, there is direct evidence of unlawful motivation, such evidence may be overcome only if it is "so destroyed by other facts and circumstances that it cannot be credited as crucial . . . [T]he employer's explanation [must be] so overwhelming that it [makes] this contrary evidence unacceptable as a matter of law." ***NLRB v. L.C. Ferguson and E.F. Von Seggern***, 257 F.2d 88, 92 (5th Cir. 1958). Accord ***NLRB v. John Langenbacher Co.***, 398 F.2d 459, 463 (2nd Cir. 1968).

Here, Respondent explicitly relied upon Antilla's protected concerted activities in her termination PIP. (GCX 4) The PIP states that Antilla "has said she hates working on the weekends because there are too many RNs and they are unsafe," "something bad is going to happen with all these new RNs." (GCX 4) The PIP states that Antilla will help a new nurse, but after the fact, "talks about them so the newer RNs feel apprehensive about asking her questions." In addition, the PIP also references that, during management's November 5 meeting with her, Antilla stated that she feels graduate nurses should not be allowed to work on the FBC, and if they are, they should have a longer orientation than 12 weeks. The PIP parallels the unlawful

introductory paragraph of the Surgical Code, stating that Respondent has "zero tolerance" for conduct that is "inappropriate or detrimental to patient care or hospital operations or that impedes harmonious interactions and relationships." (GCX 4)

Similarly, Brandt's termination PIP explicitly references her protected concerted activities. The termination PIP states that during her November 2 meeting with Ronk, Brandt shared that she feels the newer RNs were not receiving enough training in the operating room. Brandt's termination PIP also cites the unlawful introductory paragraph of the Surgical Code, stating that Respondent has "zero tolerance" for conduct that is "inappropriate or detrimental to patient care or hospital operations or that impedes harmonious interactions and relationships." (GCX 5) These statements in Antilla and Brandt's termination PIPs establish that their protected concerted activity was a motivating factor in the decision to terminate them.

In addition, Giannosa's notes of management's meetings provide direct evidence that Antilla's protected concerted activity was considered in deciding to terminate her. (RX 11) Indeed, the ALJ found these notes were relied upon in deciding to terminate Antilla. (ALJD p. 8, lines 5-7) Thus, the notes expressly state that Antilla complained about the new RNs and their licenses. The notes reflect that Wadie stated that complaints were made about experienced nurses going to day shift, leaving a lack of resources on nights, and "RNs are going to jump ship because new RNs are going to affect their licenses bad things are going to happen [sic]." (GCX27; RX10)

Andrews-Johnson's interview notes also contain direct evidence that Respondent relied upon protected concerted activity in deciding to terminate Antilla. Again, the ALJ found that Respondent relied upon these notes in deciding to terminate her. (ALJD p. 8, lines 5-7) Andrews-Johnson's notes of her interview with Kim Campbell state that Campbell heard that

Antilla heard that Antilla hates weekends because "there are too many new nurses and they are unsafe." (RX13) The interview notes with Dana Stephenson state that she heard Antilla state that they should know that something bad is going to happen with all these new nurses, and that Stephenson felt that Antilla was the "**ringleader**." (RX13) Andrews-Johnson's notes of her interview with Jennifer Aniol state that she has heard Antilla talk about how so many new nurses make the unit unsafe. (RX13) Respondent admits, and the ALJ found (ALJD p. 8, lines 5-7), that it relied upon these notes in terminating Antilla. (Tr. 465, 586) Thus, these explicit references to Antilla's complaints about working conditions establish direct evidence of Respondent's unlawful motivation.

b. Evidence inferring unlawful motive

The record also establishes evidence from which unlawful motive can be inferred. Specifically, failure to adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support an inference that Respondent's motive in discharging Antilla and Brandt was unlawful. ***Coastal Insulation Corporation***, supra; ***Medic One, Inc.***, 331 NLRB 464, 475 (2000); ***Relco Locomotives***, supra at 19.

i. Failure to adequately investigate alleged misconduct

Respondent's "investigation" into Antilla and Brandt's alleged negativity, bullying, and intimidation belies Respondent's intent not to ascertain the truth, but to build a case against the two. An employer's failure to conduct a meaningful investigation is regarded as an important indicium of discriminatory intent. ***New Orleans Cold Storage & Warehouse Co.***, ***Ltd.,*** 326 NLRB 1471, 1477-1478 (1998), enfd. 201 F.3d 592 (5th Cir. 2000); ***K&M Electronics***,

Inc., 283 NLRB 279, 291 fn. 45 (1987). The ALJ erred in finding that Respondent's investigation into the allegations regarding Antilla and Brandt was not "suspect." (ALJD p. 13, lines 37-42; ALJD p. 14, 5-6)

Although Respondent's witnesses testified that Andrews-Johnson was given the directive by Giannosa not to identify any names during her alleged interviews with staff, no employees testified. Moreover, Andrews-Johnson failed to testify as to any specific conversation with the employees interviewed, or how she selected the employees she allegedly interviewed. Respondent's witnesses provided no explanation as to why Andrews-Johnson failed to talk to the new nurses who regularly worked with Antilla and Brandt, including Dukic.

The record is devoid of evidence that anyone from management considered whether there might be issues with Wadie's competence when she stated in her email to Amlin that she was "not capable of doing the job," or that that the job she accepted at an ob/gyn office would be "more [her] speed." (RX 9) There is no evidence that anyone from management talked to any of the seasoned nurses, including the charge nurses, about Wadie's performance as a nurse. Indeed, Giannosa admitted that, during her conversations with Wadie, she did not even find out how many times Wadie worked with Brandt. (Tr. 503)

Ronk testified that she "personally felt" that Antilla and Brandt needed to be terminated by October 29, when only three employees had been interviewed, and Wadie had quit. (Tr. 566; GCX 38) Indeed, on that date, Ronk contacted Knudsen, looking for "further evidence" which could be used against Antilla. (GCX 38) Moreover, Andrews-Johnson continued to collect notes of her alleged conversations with employees even after the determination was made to terminate Antilla and Brandt, including the conversation with Maggie Fullington on November

7, which was included in Brandt's termination PIP as a reason for her discharge. (RX 13; GCX 5)

In addition, contrary to the ALJ's findings (ALJD p. 13, 18-21), Brandt was not told the specifics of what accusations were made against her until she was told she was terminated and presented with her termination PIP. Her unrebutted testimony was that she was told that she was "mean and nasty and rude," but not provided with any details to which she could offer her side of the story. (Tr. 251-253) Indeed, Ronk's notes of her meeting with Brandt corroborate Brandt's testimony. (GCX 34)

With regard to Antilla, the unrebutted evidence establishes that the only accusations close to specific which Antilla was given prior to her termination were with reference to her protected concerted activities—specifically comments regarding her nursing license being on the line, "being verbally negative in regards to the safety of the unit, [and] expressing to other staff that graduate nurses should not be in [] specialty areas such as labor and delivery." (Tr. 153-155; RX 25)

Respondent's flawed investigation supports an inference of unlawful motivation. ***New Orleans Cold Storage & Warehouse Co.***, ***Ltd.,*** supra; ***Washington Nursing Home***, ***Inc.,*** 321 NLRB 366, 375 (1996); ***K&M Electronics***, ***Inc.,*** supra. Moreover, the ALJ's failure to find that it was flawed was in error.

ii. Departures from past practices; Past tolerance of similar behavior and disparate treatment

The record shows that, contrary to the ALJ's findings (ALJD p. 14, lines 8-11), Respondent deviated from past practices in terminating Antilla and Brandt. Although Respondent had a progressive discipline policy, Respondent failed to follow it with Antilla and Brandt. (Tr. 29; RX 14) Antilla had no prior disciplines, other than for attendance. (Tr. 168-

169) Brandt's only prior discipline was the counseling she received for her Facebook posting, which stated that if she failed to demonstrate appropriate behavior she would progress to a Level I PIP, not a termination. (Tr. 298; GCX17) Respondent's deviation from its progressive discipline policy supports a finding of unlawful motivation. In addition, although Ronk stated and Giannosa placed in the PIPSs that Respondent had a "zero tolerance" policy with regard to intimidation and bullying, the record shows this was not the case. (GCX25)

The ALJ asserts that "no comparable situation had arisen in the past," (ALJD p.14, lines 9-10) however, the record shows this is simply false. The record is replete with incidents of negative interactions, intimidation, aggressiveness, and bullying that **did not involve protected concerted activity,** which did not result in terminations. (GCX25(a-f, k,l))

Evidence of disparate treatment is one of the more reliable hallmarks of unlawful discrimination. See, e.g., ***Avondale Industries***, 329 NLRB 1064, 1066 (1999). The ALJ erred by ignoring well-settled Board law and finding that the failure to terminate other employees engaged in protected concerted activities "hardly supports the General Counsel's allegation of retaliatory discharge, since [they] engaged in the same discussions as Antilla and Brandt, and made the same complaints" (ALJD p. 14, 13-16). However, it is long-established that it is settled that an employer's discriminatory motive is not disproved by evidence showing that it did not "weed out" all employees engaged in protected concerted activities. ***Wire Products Mfg. Corp.***, 326 NLRB 625, 636 (1998); ***Sawyer of Napa***, 300 NLRB 131, 152, n.46 (1990), and cases cited therein. Moreover, the distinguishing factor between the discriminatees and all other employees who received lesser discipline, including Post and Wonch, was that Respondent knew they were engaged in protected concerted activities, and perceived them as "**ringleaders**" of that "**negativity**."

iii. False and shifting reasons given in defense

In addition to their admitted reliance upon Antilla and Brandt's protected concerted activities in discharging them, Respondent also "piled-on" false, fabricated, and shifting reasons. The ALJ's analysis of Respondent's offering of piled-on and shifting reasons is legally flawed and in error. (ALJD p. 14, lines 22-29)

Although Antilla, according to her unrebutted testimony, had worn a tongue ring since she began working at Respondent in 2006 without comment from Respondent prior to November 5, it was relied upon by Respondent in her termination PIP. (Tr. 156-157; GCX 4)

In addition, Respondent asserted in the background section of Antilla's termination PIP that management "had addressed concerns related to [Antilla's] attitude and behavior previously as she was identified by co-workers as being negative and displaying bullying behavior on the unit," and that in May 2012, Andrews-Johnson shared feedback with Antilla that her peers found her intimidating. (GCX 4) However, Antilla's testimony with regard to both of these assertions was unrebutted, as was her testimony that no one from management had ever talked to her about alleged bullying or inappropriate behavior prior to November 5. (Tr. 168-169) Similarly, the termination PIP stated that Ronk addressed concerns of negativity with Antilla in September 2011. Antilla's testimony correcting the characterization of that assertion was also unrebutted. (Tr. 161-162)

Indeed, Respondent's counsel did not question Andrews-Johnson or Ronk during their testimony with regard to these alleged events. Adverse inferences may be drawn based on the failure of a party to question its own witness about matters which would normally be thought reasonable where such an omission does not appear unintentional, and such adverse inferences

are appropriate here with regard to Andrews-Johnson and Ronk's testimony. ***Colorflo Decorator Products, Inc.***, 228 NLRB 408, 410 (1977).

With regard to Brandt's termination PIP, Respondent relied upon alleged conduct which occurred six years prior to her termination, when she was still attending orientation. (GCX 5) Brandt's unrebutted testimony was, contrary to the representation in the termination PIP, management did not discuss concerns with her regarding her behavior. (Tr. 287-290)

Respondent's reliance upon these past events in Antilla and Brandt's termination PIPs are not what the ALJ cavalierly dismisses simply as "other instances of past problems that were noted (ALJD p. 14, lines 26-27);" rather they are piled-on and fabricated defenses, which compel the inference that the Respondent's asserted defense is a pretext. ***Enjo Contracting Co., Inc.***, 340 NLRB 1340, 1351 (2003). The ALJ notes "[i]f they were not included in the termination notices, the result would be the same." (ALJD p. 14, lines 27-28) That is exactly the point—those piled-on and fabricated defenses were not the true reasons for their terminations, but support an inference that the true reason for Antilla and Brandt's terminations is an unlawful reason. ***Coastal Insulation Corporation***, supra; ***Medic One, Inc.***, supra at 475; ***Relco Locomotives***, supra at 19.

Respondent also offered shifting reasons for Brandt's termination. Thus, Brandt's termination PIP states that she was terminated for "Improper Conduct." Giannosa testified that, at the time management met to decide to terminate Brandt, the Surgical Code was not relied upon. (Tr. 501) However, in Respondent's position statement[27] in response to the instant

[27] A position statement prepared by an attorney while representing a charged party during an investigation is admissible into evidence to establish an admission by a respondent. Therefore, material statements by a charged party's attorney in response to an unfair labor practice charge that have not been disavowed before the hearing are admissions that may be introduced as substantive evidence against the party. ***McKenzie Engineering Co.***, 326 NLRB 473, 485 n.6 (1998) (position statement conflicting with party's position at trial is admissible as an admission). See also ***Hogan Masonry***, 314 NLRB 332, 333 n.1 (1994); ***Steve Aloi Ford***, 179 NLRB 229 n.2 (1969). Statements of position that contain admissions can be used as substantive evidence and also to impeach a

charge, Respondent stated that Brandt engaged in "three types of prohibited conduct" set forth in the Surgical Code (RX 6) "which would not be tolerated by Respondent," specifically:

- Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients or visitors;
- Profane or abusive language directed at employees, physicians, patients,or visitors; and
- Behavior that is rude, condescending[,] or otherwise socially unacceptable. (GCX 37)

The ALJ erroneously concluded that this addition of a new justification "was counsel's opinion," and "is not a reason for the terminations." (ALJD p. 14, lines 22-24) However, it is well settled that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason is not among those advanced." ***The Bond Press, Inc.***, 254 NLRB 1227, 1232 (1981). Accord ***Steve Aloi Ford, Inc.***, 179 NLRB 229, 230 (1969). The shifting of defenses over time raises the inference of discriminatory intent. ***Black Entertainment Television***, 324 NLRB 1161, 1161(1997); ***Ippolito, Inc.***,313 NLRB 715, 724 (1994), enfd. 54 F.3d 769 (3rd Cir. 1995). The ALJ again errs in her legal analysis of the Respondent's shifting defenses. (ALJD p. 14, lines 21-24) Respondent counsel's addition of a new justification for terminating Brandt during the investigation of the charge, which was admittedly not relied upon, supports a finding of unlawful motivation.

In sum, in addition to direct evidence that Respondent terminated Antilla and Brandt due to their protected concerted activities, the record is replete with evidence from which unlawful motivation can be inferred. Respondent's failure to adequately investigate alleged

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witness whose testimony is inconsistent with the position statement. ***Elyria Foundry Co.,*** 321 NLRB 1222, 1233, 1251 (1996). Position statements can also be used to establish a shifting defense in light of variations between the grounds for discharge stated in a position statement and in trial testimony. ***Waste Management de Puerto Rico*****,** 339 NLRB 262, 277 (2003); ***Black Entertainment Television***, 324 NLRB 1161, 1161 (1997).

misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support an inference that Respondent's motive in discharging Antilla and Brandt was unlawful. ***Coastal Insulation Corporation***, supra; ***Medic One, Inc.***, supra at 475; ***Relco Locomotives***, supra at 19.

C. The ALJ erred in her reliance upon the alleged subjective reactions of other employees to Antilla and Brandt's protected concerted activities to find that Respondent met its burden establishing that Antilla and Brandt would have been terminated absent their protected concerted activity

The ALJ erred in finding that, despite the fact that the GC met her burden under ***Wright Line*****,** Respondent would have discharged Antilla and Brandt in the absence of their protected concerted activities. (ALJD p. 11, lines 15-16) Notably, in considering Antilla and Brandt's alleged misconduct, the ALJ failed to consider or distinguish Board precedent which states that "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity." ***Hispanics United of Buffalo, Inc.***, 359 NLRB at 3, citing ***Consolidated Diesel***, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). (ALJD p. 11, lines 29-43; ALJD p. 12, lines 21-32; ALJD p. 12, lines 40-43) Moreover, the ALJ erroneously relied upon the subjective reactions of other employees to Antilla and Brandt's protected concerted activities to find their terminations were justified. (ALJD p. 12, lines 46-47-ALJD p. 13, line 1; ALJD p. 12, lines 21-25; ALJD p. 12, lines 27-32; ALJD p. 12, lines 40-43)

Here, as in ***Hispanics United*** and ***Consolidated Diesel***, Respondent claims it terminated Antilla and Brandt based on employees' subjective alleged claims that they felt bullied and

intimidated. As the Fourth Circuit has noted, [s]uch a wholly subjective notion of harassment is unknown to the Act," and discipline imposed on this basis violates Section 8(a)(1). ***Consolidated Diesel Co. v. NLRB***, 265 NLRB 345, 354 (4th Cir. 2001).

In addition, in erroneously finding that Respondent met its burden, the ALJ found that Antilla and Brandt were terminated due to inappropriate conduct toward other employees, having "nothing whatever [sic] to do with workplace grievances." (ALJD p. 12, lines 27-29) However, as described above, the ALJ's factual finding that their conduct had "nothing whatever [sic] to do with workplace grievances" is simply contrary to the record evidence and belies her fundamental misunderstanding of what constitutes protected concerted activity. Respondent relied upon Wadie and other nurses' reports that Antilla, Brandt, and others were complaining about the unsafe situation caused by the influx of inexperienced nurses, the new nurses' lack of training, the risk to the nurses' licenses, and the onerous impact on their job duties. (ALJD 8, lines 5-8; GCX27, RX10, RX13) These complaints constituted protected concerted activity. ***Meyers II***, 281 NLRB at 887.

Similarly flawed is the ALJ's finding that "negative behavior meant the negative behavior exhibited toward the new nurses, belittling, condescending, and demeaning behavior. That is entirely distinct from complaining about working conditions." (ALJD p. 12, lines 21-25) What the ALJ is describing by "belittling, condescending, and demeaning behavior" is Wadie and other nurses' subjective reactions to Antilla and Brandt's complaints about working conditions, which is not a lawful justification for discharging Antilla and Brandt. ***Hispanics United***, supra. Accord ***The O'Hare Hilton***, 248 NLRB 255, 258 (1980) (employees who are "dissident and annoying" due to their protected concerted activity are still protected by the Act).

Moreover, Giannosa's notes from her conversation with Wadie reflect that Wadie told her that the negativity she experienced was "not really bullying." (GCX 27; RX 10) Giannosa's October 25 email to Ronk, Amlin, Andrews-Johnson and others expressly stated that Wadie told her that the negative behavior she encountered "wasn't really bullying." (GCX 26) Respondent's witnesses failed to explain why Antilla and Brandt were investigated and terminated for bullying when Wadie explicitly disavowed that they were engaged in bullying.

Importantly, other than protected concerted activity, Respondent failed to define what it considered bullying or intimidation, other than using vague conclusionary terms such as "negative," and "mean, nasty, intimidating, and bullying," (GCX 4 and 5) At trial, Respondent took the position, contrary to the position taken during the investigation, the anti-bullying prohibitions set forth in the Surgical Code were not relied upon in terminating Brandt. Likewise, although Antilla was questioned regarding the Professional Code of Conduct and Guidelines (RX 1), Respondent did not claim to rely upon it in terminating Antilla. The only policy Respondent claimed at trial to rely upon in deciding to terminate Antilla and Brant was the Program for Performance Management policy.[28] (Tr. 459; RX 14)

No one from management admitted to drafting the termination PIPs, with the exception of Giannosa, who admitted to inserting language regarding future expectations and Respondent's zero tolerance policy. There was no testimony from Respondent as to why it credited the alleged employee witnesses, including Wadie, and failed to even raise the specifics of the allegations of bullying with Antilla and Brandt before they were presented with their termination paperwork.

In addition, Amlin, an admitted supervisor, who was at the decisional meetings and the November 5 meeting with Antilla, failed to testify, despite the fact that she still works at

[28] To the extent Respondent would have relied upon the Surgical Code or the Professional Code in terminating Brandt or Antilla, it would have run afoul of ***The Continental Group, Inc.***, 357 NLRB No. 39 (2011).

Respondent in her same position. (Tr. 33, 43, 366,457, 493, 541, 574, 578, 582, 584; GCX 1(e) and (g); RX 25) This failure warrants an inference that, if called, Amlin's testimony would have been adverse to Respondent's case. ***Ready Mixed Concrete Company***, 317 NLRB 1140, 1145 (1995); ***International Automated Machines***, 285 NLRB 1122, 1123 (1987).

For these reasons, contrary to the ALJ's findings and conclusions, Respondent failed to establish that it would have discharged Antilla and Brandt in the absence of their protected concerted activity.

Accordingly, because Counsel for the General Counsel has satisfied its burden of showing that Antilla and Brandt were discharged for engaging in protected concerted activity, and Respondent has failed in its burden of showing that they would have been discharged even in the absence of protected concerted activity, Respondent violated Section 8(a)(1) by discharging Antilla and Brandt.

IV. CONCLUSION

Counsel for the General Counsel respectfully requests that the Board grant its Exceptions and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 27th of March, 2014.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of March, 2014, I electronically served copies of the **Counsel for the General Counsel's Brief in Support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision** on the following parties of record:

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